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Supreme Court, U.S.
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In The

Supreme Court of the United States

CLYDE THOMAS CARTER,

Petitioner,

v.

BOB RODGERS, Individually and in his capacity as Trustee in the Clyde Thomas Carter Bankruptcy, CLEMENTS ANTIQUES OF TENNESSEE, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Whether the consent of the bankruptcy court, an adjunct to the United States District Court, is required under 28 U.S.C. § 1334 before the United States District Court can have subject matter jurisdiction in an original suit filed in the United States District Court by an individual seeking monetary damages against his former bankruptcy trustee and the auctioneer for illegally purchasing assets of the debtor's bankruptcy estate, in violation of 18 U.S.C. § 154?

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PETITION FOR WRIT OF CERTIORARI

Clyde Thomas Carter respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on August 2, 2000, in order to determine an important issue presented herein which requires this Court to determine if the doctrine enunciated in *Barton v. Barbour*, 104 U.S. 126 (1881) which requires permission of the United States Bankruptcy Court before a debtor can sue his former bankruptcy Trustee and court appointed auctioneer for money damages in the United States District Court, after they purchased property of the debtor's bankruptcy estate in violation of 18 U.S.C. § 154, and their fiduciary duties to the debtor.

CITATION TO THE OPINION OF THE UNITED STATES COURT OF APPEALS

The Opinion of the United States Court of Appeals for the Eleventh Circuit in No. 99-13703, styled Clyde Thomas Carter, Plaintiff-Appellant, versus Bob Rodgers, individually and as Trustee in the Clyde Thomas Carter Bankruptcy, and Clements Antiques of Tennessee, Inc. et al., Defendants-Appellees was published and is reported at ___ F.3d page ___.

STATEMENT OF THE BASIS FOR JURISDICTION IN THE SUPREME COURT

i. The Opinion of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on August 2, 2000 in No. 99-13703, styled Clyde Thomas Carter, Plaintiff-Appellant, versus Bob Rodgers, individually and as Trustee in the Clyde Thomas Carter Bankruptcy, and Clements Antiques of Tennessee, Inc. et al., In the United States Court of Appeals for the Eleventh Circuit.

ii. The statutory provision believed to confer jurisdiction on the Supreme Court to review the Opinion of the United States Court of Appeals for the Eleventh Circuit on a writ of certiorari is 28 U.S.C. § 2101.

STATEMENT OF THE CASE

Clyde Thomas Carter (hereafter referred to as "Petitioner") filed a petition for relief under 11 U.S.C. Chapter 11 in the United States District Court for the Northern District of Alabama, Northern Division, in March 1991 and the petition was referred to the United States Bankruptcy Court for the Northern District of Alabama, Northern Division pursuant to the standing order of the District Court. In July 1994, the proceeding under Chapter 11 was converted to a liquidation proceeding under 11 U.S.C. Chapter 7 and the Case was assigned to Bankruptcy Judge Jack Caddell.

Prior to his appointment as Bankruptcy Judge, Jack Caddell was an attorney practicing in Decatur, Alabama. Bob Rodgers, the Petitioner's Trustee in Bankruptcy, was

listed in Martindale-Hubble Law Directory as one of Judge Caddell's representative clients. After Jack Caddell was appointed Bankruptcy Court Judge, and after the Carter bankruptcy proceedings were converted to a liquidation proceeding under 11 U.S.C. Chapter 7, Judge Caddell appointed Bob Rodgers, as Trustee of the Carter bankruptcy proceeding under 11 U.S.C. Chapter 7.

Sometime after his appointment, Bob Rodgers, acting as Petitioner's Bankruptcy Trustee, employed Clements Antiques of Tennessee, Inc., and its principal stockholders and executive officers, Charles W. Clements, Sr. and Charles W. Clements, Jr., (hereafter referred to collectively as the "Clements") as auctioneers to liquidate certain personal property, including the contents of the Petitioner's residence and his automobile, all of which was itemized, and appraised by the Petitioner at $246,000.00.

The Clements conducted an auction on August 5, 1995, organized and attended by Bob Rodgers as Trustee and the Clements and various members of their immediate families. During the course of the auction on August 5, 1995, the Trustee Bob Rodgers, through his wife, bid upon and purchased furniture from the Petitioner's bankruptcy estate. The Clements, individually and through their immediate family members, bid on and purchased various items of personal property constituting a part of Petitioner's bankruptcy estate.

Various members of the Clements family purchased furniture, television sets, and other electronic equipment at the auction of the Petitioner's personal property.

In addition, Clements Antiques of Tennessee, Inc., acting through its principal stockholders and executive officers, Charles W. Clements, Sr. and Charles W. Clements, Jr., with the consent, agreement and approval of the Trustee Bob Rodgers, purchased the Petitioner's 1994 Chrysler automobile for $15,500.

Petitioner sought the removal of Bob Rodgers as Trustee in the Chapter 7 bankruptcy proceedings then pending in the Bankruptcy Court before Judge Caddell, based on the breach by Bob Rodgers of his fiduciary duties as Trustee, including breach of his duties of reasonable care in authorizing and permitting the Clements to purchase Petitioner's furniture and automobile at the August 5, 1995 auction. Petitioner also sought the removal of Clements Antiques of Tennessee, Inc., and its principal stockholders and executive officers, Charles W. Clements, Sr. and Charles W. Clements, Jr., as auctioneers and disgorgement of auctioneer's fees and commissions paid to the Clements pursuant to 18 U.S.C. §§ 152, 153 and 154.

Prompted by Petitioner's efforts for the removal of Bob Rodgers as Trustee for breach of his fiduciary duties and further breach of his duties of reasonable care in authorizing and permitting the Clements to purchase Petitioner's furniture and automobile at the August 5, 1995 auction, Judge Caddell (recognizing his prior relationship and the resulting judicial conflict of interests with his former client, Bob Rodgers) resigned as the Bankruptcy Judge presiding in Petitioner's bankruptcy proceeding. Thereafter, Honorable Thomas B. Bennett was designated as presiding Judge in the pending bankruptcy proceeding.

Petitioner continued his efforts for the removal of Bob Rodgers as Trustee based upon the Trustee's breach of his fiduciary duties and further breach of his duties of reasonable care in authorizing and permitting the auctioneer and various members of the Clements family to purchase Petitioner's furniture and automobile at the August 5, 1995 auction which had resulted in financial losses to Petitioner substantially in excess of $75,000.00. In order to avoid his forcible removal, Bob Rodgers resigned as Trustee in the Petitioner's Chapter 7 bankruptcy proceedings and also as a panel trustee in the United States Bankruptcy Court for the Northern District of Alabama, Southern Division, thus making him ineligible for trustee's fees that he would have earned in the future on disposition of assets of the Petitioner's bankruptcy estate.

Thereafter, on Motion by Petitioner, the Bankruptcy Court, Honorable Thomas B. Bennett presiding, ordered Clements Antiques of Tennessee, Inc., to disgorge the auctioneer's fees and commissions previously approved by the Bankruptcy Court and paid to the Clements by Bob Rodgers, Trustee.

Petitioner, now a resident of Texas, filed suit on November 21, 1997 in the United States District Court, Northern District of Alabama, Huntsville Division, seeking compensatory damages, in excess of $75,000.00, exclusive of interest and costs, and punitive damages against Bob Rodgers, individually and as former trustee, and the Clements for breach of their fiduciary duties and breach of their duties of reasonable care which has resulted in financial loss to Petitioner.

Petitioner, Bob Rodgers and the Clements each filed Motions for Summary Judgment. The District Court overruled portions of the Motions for Summary Judgment filed by Bob Rodgers and the Clements, finding that Petitioner had standing to sue, but based on *Barton v. Barbour*, 104 U.S. 126 (1881), ordered the Petitioner to Show Cause why his suit should not be dismissed for lack of subject matter jurisdiction. After submission of Briefs, the District Court entered a Memorandum Opinion on August 30, 1999 in which the District Court, in reliance on the so-called Barton Doctrine, held that the District Court lacked subject matter jurisdiction because Petitioner failed to obtain the consent of the Bankruptcy Court, adjunct to the District Court, prior to filing suit against Bob Rodgers and the Clements and dismissed Petitioner's suit.

Petitioner timely appealed to the Court of Appeals, Eleventh Circuit. The Court of Appeals affirmed the August 30, 1999 Order of the District Court dismissing Petitioner's suit on the grounds that:

1. Petitioner "must obtain leave of the bankruptcy court before initiating an action in district court when that action is against the trustee or other bankruptcy-court-appointed officer for acts done in the actor's official capacity."

2. "[W]hen leave is required, it is required before pursuing remedies in either state or other federal courts."

3. "The bankruptcy court has jurisdiction over [Petitioner's] claims because his breach of fiduciary duty and reasonable care claims are 'related to' and 'within the scope' of the bankruptcy proceedings."

4. "While [Petitioner's] action against [Bob Rodgers and the Clements] arose after the date of the bankruptcy petition, his suit turns solely on allegations of wrongdoing in the sale of property belonging to the bankruptcy estate. Any recovery would reduce the administrative expenses of the sale of the estate property and would perforce increase the amount of estate property available to satisfy creditors' claims. Thus the outcome of this case will impact [Petitioner's] bankruptcy estate."

5. Petitioner "failed to obtain leave from the bankruptcy court when such leave was a pre-requisite to filing this civil action against [Bob Rodgers and the Clements] outside that court. Therefore the district court lacked subject matter jurisdiction and properly dismissed this civil action against [Bob Rodgers and the Clements]."

ARGUMENT

Summary of the Facts

A very brief review of the facts reveals the corruption of Bob Rodgers as Trustee and Clements Antiques of Tennessee, Inc., and its executive officers, Charles W. Clements, Sr. and Charles W. Clements, Jr., as auctioneers, in the bankruptcy proceedings under 11 U.S.C. Chapter 7 pertaining to Petitioner.

Judge Caddell appointed his former client, Bob Rodgers, as Trustee in Petitioner's Chapter 7 bankruptcy proceeding. Bob Rodgers, as bankruptcy Trustee, employed Clements Antiques of Tennessee, Inc., and its principal stockholders and executive officers, Charles W. Clements, Sr. and Charles W. Clements, Jr., as auctioneers

to liquidate Petitioner's furniture, and automobile. The Clements conducted an auction on August 5, 1995 organized and attended by Bob Rodgers as Trustee and the Clements and various members of their immediate families, and at which the Trustee, Bob Rodgers, through his wife, purchased furniture of the Petitioner. Further, the auctioneer's principals, and immediate family, purchased the Petitioner's personal property, furniture and an automobile.

Petitioner sought removal of the bankruptcy court appointed Trustee, Bob Rodgers, and the bankruptcy Court approved auctioneers, Clements Antiques of Tennessee, Inc. on the grounds of breach of the Trustee's fiduciary duties due to his purchase of Petitioner's furniture, and further breach of his duties of reasonable care in authorizing and permitting the auctioneer and various members of the Clements family to purchase Petitioner's furniture and automobile at the August 5, 1995 auction which resulted in financial loss to Petitioner in excess of $75,000.00.

As a result of Petitioner's efforts, the presiding Bankruptcy Judge, Jack Caddell, disqualified himself on grounds of bias and prejudice due to the conflict of interest with respect to his former client, Bob Rodgers. In order to avoid forcible removal, Bob Rodgers resigned as the Trustee in Petitioner's Chapter 7 bankruptcy proceedings and also as a panel trustee in the United States Bankruptcy Court for the Northern District of Alabama, Southern Division, thus making him ineligible for trustee's fees that would have been earned in the future on disposition of assets of the Petitioner's bankruptcy estate. And the successor Bankruptcy Judge ordered the

auctioneer, Clements Antiques of Tennessee, Inc., to disgorge the auctioneer's fees and commissions previously approved by the Bankruptcy Court and paid to the Clements by Bob Rodgers, Trustee and enjoined Clements Antiques of Tennessee, Inc., and its executive officers, Charles Clements, Sr. and Charles Clements, Jr., from ever again acting as auctioneers in a bankruptcy proceeding for the Bankruptcy Court.

First Point

In the context of the facts summarized above, the Court of Appeals held that Petitioner "must obtain leave of the bankruptcy court before initiating an action in district court when that action is against the trustee or other bankruptcy-court-appointed officer for acts done in the actor's official capacity."

That requirement is the epitome of the elevation of form over substance. Petitioner has already gone to the bankruptcy court prior to filing suit in the District Court and (1) obtained the judicial disqualification of Jack Caddell as the bankruptcy judge due to his bias and prejudice resulting from his conflict of interest in regard to the appointment of his former client Bob Rodgers as Trustee; (2) obtained the judicially sanctioned forced resignation of Bob Rodgers as bankruptcy Trustee based upon his judicially admitted breach of his fiduciary duties and his duty of reasonable care as a "bankruptcy-court-appointed officer for acts done in the actor's official capacity" resulting in financial loss to Petitioner as alleged in Petitioner's lawsuit in the District Court; and (3) obtained the

judicially forced removal and judicially ordered disgorgement of the fees of Clements Antiques of Tennessee, Inc., and its executive officers, Charles Clements, Sr., and Charles Clements, Jr., as the "bankruptcy-court-appointed officer for acts done in the actor's official capacity" as auctioneer.

To require Petition to "obtain leave of the bankruptcy court before initiating an action in district court" under the circumstances described above before initiating a civil action against Bob Rodgers and the Clements in the District Court is, in the vernacular of the market-place, carrying coals to Newcastle.

The Court of Appeals, Eleventh Circuit, referenced *In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998), in suggesting that "the policy behind this leave of court requirement" was well-stated by the Seventh Circuit:

> If [the trustee] is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be impeded. . . . Without the requirement [of leave], trusteeship will become a more irksome duty, and so it will be harder for courts to find competent people to appoint as trustees. Trustees will have to pay higher malpractice premiums, and this will make the administration of the bankruptcy laws more expensive. . . . Furthermore, requiring that leave to sue be sought enables bankruptcy judges to monitor the work of the trustees more effectively. Linton, 136 F.3d at 545.

The statement of policy enunciated by the Seventh Circuit may be appropriate where an honest Trustee is the subject of the court's protection, but such a policy is

obviously inappropriate where the bankruptcy judge has in fact monitored the work of the trustee, as actually occurred in this case, and found the actions of the Trustee and his designated auctioneer rife with corruption. Obviously, the work of the Trustee was impeded, but not by the Petitioner. To the contrary, the bankruptcy judge found the dishonest Trustee in the present case to be incompetent and approved his resignation in lieu of removal.

To require Petitioner to again return to the Bankruptcy Court for the Northern District of Alabama in order to "obtain leave of the bankruptcy court before initiating an action in district court when that action is against the trustee or other bankruptcy-court-appointed officer for acts done in the actor's official capacity" is unnecessary and an easily avoidable expense to Petitioner.

Moreover the requirement espoused by the Court of Appeals that Petitioner "obtain leave of the bankruptcy court before initiating an action in district court" in the circumstances described above is clearly duplicitous and would create an unnecessary and easily avoidable expense to Petitioner. Further, it is an unprecedented waste of judicial resources on the part of both the District Court and its adjunct Bankruptcy Court.

Second Point

The Court of Appeals relied on the rule referred to as the "Barton doctrine" as announced in this Court's decision of *Barton v. Barbour,* 104 U.S. 126, 127 (1881) in support of its observation that Petitioner's lawsuit in the District Court "is a run-of-the mill Barton case [which

requires that Petitioner obtain] leave of the bankruptcy court, and absent that leave, the district court correctly found that it did not have subject matter jurisdiction over his cause of action". Opinion, p. 6.

The Court of Appeals cited seven cases (Opinion p. 4-5) in support of its observation that Petitioner's lawsuit in the District Court "is a run-of-the mill Barton case" as follows:

1. *Springer v. Infinity Group Co.*, No. 98-5182, 189 F.3d, 478 (10th Cir. Aug. 26, 1999) (unpublished table decision) *cert denied*, 120 S.Ct. 1422 (2000);

2. *Gordon v. Nick*, No. 96-1858, 162 F.3d 1155 (4th Cir. Sept. 2, 1998) (unpublished table decision);

3. *In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998);

4. *Lebovits v. Scheffel (In re Lebal Realty Assocs.)*, 101 F.3d 272 (2d Cir. 1996);

5. *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993);

6. *Vass v. Conron Bros. Co.*, 59 F.2d 969, 970 (2d Cir. 1932);

7. *Kashani v. Fulton (In re Kashani)*, 190 B.R. 875, 885 (9th Cir. B.A.P. 1995).

None of the seven cases cited and relied upon by the Court of Appeals involved a situation where, *prior to the initiation of suit in the district court*, (1) did the bankruptcy judge disqualified himself due to his bias and prejudice arising out of his conflict of interest in regard to the appointment of his former client as Trustee; (2) did the

"bankruptcy-court-appointed" Trustee submitted his forced resignation to the bankruptcy court based upon his judicially admitted breach of his fiduciary duties and his duty of reasonable care as a "bankruptcy-court-appointed officer for acts done in the actor's official capacity" as alleged in Petitioner's lawsuit in the District Court, and (3) did the "bankruptcy-court-appointed [auctioneer and its executive officers were forcibly removed by the successor bankruptcy court] for acts done in the actor's official capacity" and were ordered to disgorge its fees as auctioneer and thereafter were precluded from ever again acting as a "bankruptcy-court-appointed" auctioneer in that bankruptcy court.

In *Barton v. Barbour,* supra, this Court held that a suit against an equity receiver could not be maintained without the permission of the court that had appointed him. The purpose of that ruling was to prevent creditors from circumventing the receivership proceedings by suing the receiver in a different court.

The Petitioner in this case has not circumvented the Bankruptcy Court for the Northern District of Alabama by filing suit in the District Court for the Northern District of Alabama seeking recovery for the actions of his former Trustee, Bob Rodgers, and the former auctioneers, the Clements.

In the first place, Petitioner initiated the proceedings in the Bankruptcy Court, which resulted in the forced resignation, with approval of the Bankruptcy Court, of Bob Rodgers, the Petitioner's bankruptcy Trustee and the forced removal of the Clements, as the bankruptcy-court-approved auctioneers.

Secondly, the Bankruptcy Court for the Northern District of Alabama is not a separate and different court, but rather an adjunct to the District Court for the Northern District of Alabama. 28 U.S.C. § 1334. The Bankruptcy Court for the Northern District of Alabama derives its jurisdiction and power from the District Court for the Northern District of Alabama upon the initial referral of Petitioner's bankruptcy proceedings to its adjunct Bankruptcy Court and upon conclusion of the proceedings in the Bankruptcy Court which resulted in the termination of Bob Rodgers as Trustee and the removal of the Clements as auctioneers. The jurisdiction and power of the Bankruptcy Court with respect to the former Trustee and the former auctioneers is derived from the District Court, from whence the jurisdiction and power of the Bankruptcy Court is based pursuant to 28 U.S.C. § 1334.

Finally, the opinion of the Court of Appeals that the District Court lacked subject matter jurisdiction because Petitioner is required to obtain the permission of the Congressionally created adjunct Bankruptcy Court prior to filing his Complaint in the District Court which was created pursuant to Article III of the Constitution, is neither knowledgeable nor logical. The District Court is the Court of jurisdiction and power prescribed by the Constitution, while the specialized but subordinate jurisdiction and power is delegated to the adjunct Bankruptcy Court in bankruptcy proceedings in the manner similar to the jurisdiction and power delegated to Magistrates. To that extent, the District Court and its adjunct Bankruptcy Court constitute one and the same forum and the subject matter jurisdiction for the District Court is one and the same and co-existent with the subject matter jurisdiction

for the adjunct Bankruptcy Court. Surely the right hand should know what the left hand is doing in the course of the bankruptcy proceedings. Federal Rules of Evidence Rule 201 et seq. It is therefore redundant to require Petitioner to obtain the permission of the adjunct Bankruptcy Court prior to filing his Complaint in the District Court.

Contrary to the opinion held by the Court of Appeals, the original lawsuit filed on November 21, 1997 by Petitioner, a resident of Texas, in the United States District Court, Northern District of Alabama, Huntsville Division, seeking compensatory and punitive damages against his former bankruptcy Trustee, Bob Rodgers, and the Clements, as court approved auctioneers, for breach of their fiduciary duties and breach of their duties of reasonable care is clearly not "a run-of-the-mill Barton Case" and each of the cases cited by the Court of Appeals in support of that view are distinguishable on the facts from the case at bar.

Moreover, Petitioner's suit against Bob Rodgers and the Clements is not a suit against an equity receiver but one against a corrupt former trustee and a corrupt former auctioneer, each of whom had been judicially removed from their position prior to the institution of Petitioner's suit in the District Court.

Finally, Petitioner's suit in the District Court did not circumvent the Bankruptcy Court by suing the former Trustee and the former auctioneer in a different court, obviously because the subordinate Bankruptcy Court is an adjunct to the dominant District Court. 28 U.S.C. § 1334.

Third Point

The United States Bankruptcy Court for the Northern District of Alabama is an adjunct to the United States District for the Northern District of Alabama (the "District Court"). The District Court derives its existence from Article III of the United States Constitution and its jurisdiction is defined in 28 U.S.C. §§ 1331, 1332 and 1334. The Bankruptcy Court derives its existence from an Act of Congress set forth in Pub. L. 98-353, Title I, § 104(a) July 10, 1984, 88 Stat. 336 and the scope of its jurisdiction is defined in 28 U.S.C. § 1334.

District Courts possess original and exclusive jurisdiction of "all cases under title 11" and "all civil proceedings arising under title 11, or arising in or related to cases under title 11 pursuant to the provisions of 28 U.S.C. §§ 1334(a) and (b). Thus, § 1334 grants jurisdiction to the District Court over four types of bankruptcy matters; (1) cases under title 11, i.e., the bankruptcy case itself; (2) proceedings arising under title 11; (3) proceedings arising in cases under title 11; and (4) proceedings related to cases under title 11.

Bankruptcy judges are vested with full judicial power and thus may enter final orders and judgments, subject to appellate review, in cases under title 11 and proceedings arising under title 11 or arising in a case under title 11. However, with respect to bankruptcy court jurisdiction granted to the district court under 1334(b) proceedings related to cases under title 11, a bankruptcy judge has only limited authority. While the proceeding is still referred to the bankruptcy judge, the bankruptcy judge acts as an adjunct to the district court, in a fashion similar

to that of a magistrate or special master. *Maitland v. Mitchell (In re Harris Pine Mills)*, 44 F.3d 1431, 1436 (9th Cir. 1995).

If a district court has bankruptcy jurisdiction over a case, 28 U.S.C. § 157 allows the court to refer the case to bankruptcy judges, who are "judicial officers of the district court." 28 U.S.C. § 151. *Sanders Confectionery Prod. Inc. v. Heller Financial, Inc.*, 973 F.2d 474 (6th Cir. 1992).

"The bankruptcy judge's authority to hear matters is defined in § 157 . . . " *Biglari Import & Export, Inc. v. Nationwide Mut. Fire Ins. Co. (In re Biglari Import & Export, Inc.)*, 142 B.R. 777, 781 n. 6 (Bankr. W.D.Tex. 1992). Upon such referral, § 157(b) provides guidance to the bankruptcy judge as to what matters within § 1334 jurisdiction may be heard and determined by bankruptcy judges, who are not Article III judges, and what matters may be heard and determined by district judges, who are Article III judges.

The authority to hear the matters defined in § 157 has no bearing on whether the district court has jurisdiction. *Kirk v. Hendon, (In re Heinsohn)*, 231 B.R. 48, 55 (Bankr. E.D. Tenn. 1999). To state it another way, the district court's and bankruptcy court's jurisdiction is coextensive with respect to core proceedings. However, absent consent of the parties a bankruptcy court does not have subject matter jurisdiction over non-core, i.e., "related" proceedings although such proceedings are still within a district court's jurisdiction.

Petitioner's tort action in the District Court seeking compensatory damages and punitive damages against Bob Rodgers, individually and as former trustee, and the

Clements for breach of their fiduciary duties and duties of reasonable care resulting in financial loss to Petitioner is *not* a "core proceeding" which invokes a substantive right created by federal bankruptcy law or one which could not exist outside of the bankruptcy. Consequently, the bankruptcy court did *not* have jurisdiction to adjudicate the Petitioner's claims under the theory that the case presents a core proceeding which arose (1) under title 11, i.e., in the bankruptcy case itself; nor (2) in proceedings arising under title 11; nor (3) in a proceedings arising in a case under title 11.

Moreover, the outcome of the case can not conceivably have any impact on the handling and administration of the bankruptcy estate, nor any effect on the debtors rights, liabilities, options or freedom of action. The test for determining whether a proceeding is only "related" to the bankruptcy case and is thus non-core:

> [I]s whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom from action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate. In re Best Reception Systems, Inc. 220 B.R. at 943 (quoting Robinson v. Mich. Consol. Gas Co. 918 F.2d 579, 583 (6th Cir. 1990)).

Petitioner's lawsuit against Bob Rodgers and the Clements does not invoke a substantive right created by federal bankruptcy law and clearly could exist outside of the bankruptcy. Petitioner's causes of action against Bob Rodgers and the Clements arose after the bankruptcy

proceedings were converted from Chapter 11 to a proceeding under Chapter 7 and consequently were not a part of the bankruptcy estate but belonged to Petitioner alone rather than to the successor trustee appointed by the bankruptcy court.

Thus, neither the Bankruptcy Court nor the successor trustee appointed to replace Bob Rodgers were authorized to grant or deny permission to Petitioner to institute a lawsuit against the former trustee or the former auctioneers.

Fourth Point

The tortuous action of Bob Rodgers and the Clements which gave rise to the cause of action evidenced in Petitioner's original lawsuit filed in the District Court, Northern District of Alabama arose after the conversion of the bankruptcy proceedings from Chapter 11 to Chapter 7. Consequently, the causes of action pled by Petitioner in his original lawsuit is not property of the bankruptcy estate nor subject to review or administration by the bankruptcy court. 11 U.S.C. § 541. Any cause of action that is not property of the bankruptcy estate belongs to Petitioner. *Bobroff v. Continental Bank (In re Bobroff)*, 766 F.2d 797 (3rd Cir. 1985). The bankruptcy court does not have jurisdiction over either of Petitioner's causes of action against Bob Rodgers or Clements Antiques of Tennessee. *Boone v. Community Bank of Homestead, (In re Boone)*, 52 F.3d 958 (11th Cir. 1995). Under those circumstances, Petitioner is entitled to pursue his causes of action in the District Court under either of 28 U.S.C.

§§ 959, 1331 or 1334 without the necessity of first obtaining leave of the bankruptcy court in order to do so.

Conclusion

The Court of Appeals concluded that: "[T]he district court lacked subject matter jurisdiction and properly dismissed this civil action against [Bob Rodgers and the Clements]" because Petitioner "failed to obtain leave from the bankruptcy court when such leave was a prerequisite to filing this civil action against [Bob Rodgers and the Clements] outside that court." Opinion p. 11.

Because federal courts derive power only from the Constitution and acts of Congress, not from acts of the parties to the litigation, "the parties are incapable of conferring upon [the District Court] a jurisdictional foundation [which the District Court] otherwise lacks simply by waiver or procedural default." *United States v. Harris*, 149 F.3d 1304, 1309 (11th Cir. 1998). Since the lack of subject matter jurisdiction cannot be procedurally defaulted in the first place, it is therefore a non-sequitur to suggest that Petitioner "failed to obtain leave from the bankruptcy court when such leave was a prerequisite to filing this civil action against [Bob Rodgers and the Clements] outside that court." *Kelly v. United States*, 29 F.3d 1107, 1112-1113 (7th Cir 1994); *United States v. Harris*, 149 F.3d 1304 at p. 1309 (11th Cir. 1998).

The Court of Appeals clearly erred in affirming the dismissal of Petitioner's lawsuit against Bob Rodgers and the Clements on the ground of lack of subject matter jurisdiction, due to filing his lawsuit against his former

trustee and auctioneer in District Court without first obtaining leave of the adjunct Bankruptcy Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays the Supreme Court to grant a Writ of Certiorari addressed to the United States Court of Appeals, Eleventh Circuit, because the United States Court of Appeals has decided an important Federal Question in a way that is in conflict with the decision of this court in the case of *Barton v. Barbour,* 104 U.S. 126, 127 (1881) and has so far departed from the accepted and usual course of judicial procedure and sanctioned such a departure by the United States District Court for the Northern District of Alabama as to call for an exercise of this Court's supervisory power.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13703

D.C. Docket No. 97-03063-CV-S-NE

CLYDE THOMAS CARTER,

Plaintiff-Appellant,

versus

BOB RODGERS, Individually and, in his capacity as Trustee in the Clyde Thomas Carter Bankruptcy, CLEMENTS ANTIQUES OF TENNESSEE, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(August 2, 2000)

Before TJOFLAT and HULL, Circuit Judges, and PROPST*, District Judge.

HULL, Circuit Judge:

Plaintiff-Debtor Clyde Thomas Carter appeals the district court's dismissal of his civil action based on his

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* Honorable Robert B. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

failure to seek leave first from the bankruptcy court to file this action. We affirm.

I. BACKGROUND

Plaintiff Clyde Thomas Carter was a debtor in a Chapter 7 bankruptcy proceeding. Defendant Bob Rodgers was the initial Bankruptcy Trustee ("Trustee") in Carter's bankruptcy proceeding. As Trustee, Rodgers appointed Defendant Clements Antiques of Tennessee, Inc. ("Clements Antiques"), and its principals, Defendants Charles W. Clements, Sr. and Charles W. Clements, Jr. ("the Clements") to conduct a sale of Carter's personal property. The bankruptcy court approved these appointments.

Clements Antiques conducted the sale by way of auction on August 5, 1995. Trustee Rodgers and his wife attended the auction, and Rodgers's wife successfully bid on an item.[1] Likewise, Clements Antiques, Clements Sr., and Clements Jr. (or family members on their behalf) purchased items at the auction. Upon learning of these purchases, the bankruptcy administrator for the Northern District of Alabama complained that the purchases rendered all Defendants non-disinterested parties in contravention of the Bankruptcy Code. *See* 11 U.S.C. § 701(a)(1)

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[1] Trustee Rodgers' wife, Mary Rodgers, purchased an oak dresser for $300, which was the last and highest bid for the dresser at the auction. Mrs. Rodgers offered to void the dresser's sale and return the item to the new trustee. This offer was denied by the new trustee who determined that "voiding of the sale would not add value to the estate."

("[T]he United States trustee shall appoint one disinterested person . . . to serve as . . . trustee."); 11 U.S.C. § 327(a) ("[T]he trustee . . . may employ . . . auctioneers . . . that do not hold or represent an interest adverse to the estate."). As a result, Rodgers resigned as Trustee, and Clements Antiques returned all commissions and buyer's premiums received in connection with the auction.[2]

Carter filed this civil action in district court seeking compensatory and punitive damages from Trustee Rodgers, Clements, and Clements Antiques based on alleged breaches of fiduciary duties and duties of reasonable care with respect to Carter's bankruptcy estate. The district court found that Carter failed to obtain leave of the bankruptcy court before filing this lawsuit and dismissed Carter's lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction.[3] Carter timely appealed.

II. DISCUSSION

A. The *Barton* Doctrine

This case presents an issue of first impression in this circuit regarding whether a debtor first must obtain leave

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[2] Clements Antiques and the successor Chapter 7 trustee entered into a settlement whereby Clements Antiques agreed to return all commissions and fees it had received in connection with the auction, which totaled approximately $8,600.

[3] We review a dismissal for lack of subject matter jurisdiction de novo. *See, e.g., Pillow v. Bechtel Constr., Inc.*, 201 F.3d 1348, 1351 (11th Cir. 2000).

from the bankruptcy court before it can initiate an action in the district court when that action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor's official capacity. Joining the other circuits that have considered this issue, we hold that a debtor must obtain leave of the bankruptcy court before initiating an action in district court when that action is against the trustee or other bankruptcy-court-appointed officer,[4] for acts done in the actor's official capacity. *See Springer v. Infinity Group Co.*, No. 98-5182, 189 F.3d 478 (10th Cir. Aug. 26, 1999) (unpublished table decision), *cert. denied*, 120 S.Ct. 1422 (2000); *Gordon v. Nick*, No. 96-1858, 162 F.3d 1155 (4th Cir. Sept. 2, 1998) (unpublished table decision); *In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998); *Lebovits v. Scheffel* (*In re Lehal Realty Assocs.*), 101 F.3d 272 (2d Cir. 1996); *Allard v. Weitzman* (*In re DeLorean Motor Co.*), 991 F.2d 1236, 1240 (6th Cir. 1993); *Vass v. Conron Bros. Co.*, 59 F.2d 969, 970 (2d Cir. 1932); *Kashani v. Fulton* (*In re Kashani*), 190 B.R. 875, 885 (9th Cir. BAP 1995).

"An unbroken line of cases . . . has imposed [this] requirement as a matter of federal common law." *Linton*,

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[4] In this case, Defendants other than Rodgers were not court "appointed," but rather court "approved." We find this distinction irrelevant, and hold that these court approved officers functioned as the equivalent of court appointed officers for purposes of the *Barton* doctrine. *See Allard v. Weitzman* (*In re DeLorean Motor Co.*), 991 F.2d 1236, 1240 (6th Cir. 1993) ("We hold as a matter of law [that] . . . court appointed officers who represent the estate, are the functional equivalent of a trustee, where as here, they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets.").

136 F.3d at 545. In so holding, these circuit courts have applied the rule referred to as the "*Barton* doctrine." *See id.* The Supreme Court in *Barton v. Barbour*, 104 U.S. 126, 127 (1881), stated that "[i]t is a general rule that before suit is brought against a receiver[,] leave of the court by which he was appointed must be obtained." *Barton* involved a receiver in state court, but the circuit courts have extended the *Barton* doctrine to lawsuits against a bankruptcy trustee. In *Linton*, the Seventh Circuit explained the reasons behind its application of the Barton doctrine to a bankruptcy trustee, as follows: "The trustee in bankruptcy is a statutory successor to the equity receiver, and . . . [j]ust like an equity receiver, a trustee in bankruptcy is working in effect for the court that appointed or approved him, administering property that has come under the court's control by virtue of the Bankruptcy Code." 136 F.3d at 545.

In addition, the policy behind this leave of court requirement was well-stated by the Seventh Circuit:

> If [the trustee] is burdened with having to defend against suits by litigants disappointed by his actions on the court's behalf, his work for the court will be impeded. . . . Without the requirement [of leave], trusteeship will become a more irksome duty, and so it will be harder for courts to find competent people to appoint as trustees. Trustees will have to pay higher malpractice premiums, and this will make the administration of the bankruptcy laws more expensive. . . . Furthermore, requiring that leave to sue be sought enables bankruptcy judges to monitor the work of the trustees more effectively.

Linton, 136 F.3d at 545.

Plaintiff's suit is a run-of-the-mill *Barton* case. Carter sued Defendants in district court for breaches of fiduciary duties stemming from their official bankruptcy duties. He needed leave of the bankruptcy court, and absent that leave, the district court correctly found that it did not have subject matter jurisdiction over his cause of action.

B. Federal vs. State Causes of Action

Carter argues that the *Barton* doctrine requires parties to obtain leave of the bankruptcy court only when they wish to pursue a state court remedy. We disagree, and hold that when leave is required, it is required before pursuing remedies in either state or other federal courts. We find no reason to distinguish between instances where the trustee is sued in state court and those in which the trustee is sued in federal court. *See Kashani v. Fulton* (*In re Kashani*), 190 B.R. 875, 885 (9th Cir. BAP 1995) ("[L]eave to sue the trustee is required to sue in those federal courts other than the bankruptcy court which actually approves the trustee's appointment."); *In re Krikava*, 217 B.R. 275, 279 (Bankr. D. Neb. 1998) ("Consent of the appointing bankruptcy court is required even when the plaintiff seeks to sue in another federal court.").

C. "Related to" Bankruptcy Requirement

There also is no merit to Carter's assertion that his tort claims – breach of fiduciary duty and reasonable care – are "unrelated to" and "outside the scope" of the bankruptcy proceeding because they do not arise directly from substantive provisions of the Bankruptcy Code. Carter

posits the theory that because his claims are unrelated to the bankruptcy proceeding, the bankruptcy court lacks jurisdiction over his lawsuit and, therefore, he was not required to obtain leave of the bankruptcy court before bringing his suit in district court.

We disagree. The bankruptcy court has jurisdiction over Carter's claims because his breach of fiduciary duty and reasonable care claims are "related to" and "within the scope" of the bankruptcy proceeding. Because Carter's claims are related to the bankruptcy proceeding, we need not determine whether leave of the bankruptcy court is required when a debtor sues a trustee for a tort completely "unrelated to" and "outside the scope" of the bankruptcy proceeding.

A proceeding is within the bankruptcy jurisdiction, defined by 28 U.S.C. § 1334(b), if it "arises under" the Bankruptcy Code or "arises in" or is "related to" a case under the Code. " 'Arising under' proceedings are matters invoking a substantive right created by the Bankruptcy Code. The 'arising in a case under' category is generally thought to involve administrative-type matters, or as the . . . court put it, 'matters that could arise only in bankruptcy.' " *In re Toledo*, 170 F.3d 1340, 1345 (11th Cir. 1999) (citations omitted). We have stated, "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." *Miller v. Kemira, Inc.* (*In re Lemco Gypsum, Inc.*), 910 F.2d 784, 788 (11th Cir. 1990).

While Carter's action against Defendants arose after the date of the bankruptcy petition, his suit turns solely on allegations of wrongdoing in the sale of property belonging to the bankruptcy estate.[5] Any recovery would reduce the administrative expenses of the sale of the estate property and would perforce increase the amount of estate property available to satisfy creditors' claims. *See* 11 U.S.C. § 541(a)(7); *see, e.g., McGuirl v. White*, 86 F.3d 1232 (D.C. Cir. 1996). Thus, the outcome of this case will impact Carter's bankruptcy estate.

Further, Carter sued the trustee and other court approved officers of his bankruptcy estate for alleged breaches of their bankruptcy-related duties. The Bankruptcy Code establishes the office of trustee and defines the trustees' duties. Moreover, an action against a bankruptcy trustee for breach of bankruptcy-related fiduciary duty can only arise in a bankruptcy case. Thus, Carter's "fiduciary claims against [the fiduciaries] are within the bankruptcy jurisdiction defined by 28 U.S.C. § 1334(b)

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[5] The instant case is quite different from that in *Boone v. Community Bank of Homestead (In re Boone)*, 52 F.3d 958 (11th Cir. 1995), where we determined that the bankruptcy court lacked jurisdiction over a lawsuit by Chapter 7 debtors against a creditor for tortious interference. In *Boone*, the conduct giving rise to the claim occurred after the date of the bankruptcy petition, and it was clear that the lawsuit "ha[d] no conceivable effect on the estate or the administration of the estate," and that the outcome of the tortious interference claim would not alter the "rights and duties arising from the petition in bankruptcy." *See Boone*, 52 F.3d at 961. In the present case, while Carter's lawsuit against Defendants also arose after the date of the bankruptcy petition, his action will have an effect on the estate and the administration of the estate.

both as 'arising under' the Code and 'arising in' a bankruptcy case." *Schechter v. Illinois* (*In re Markos Gurnee Partnership*), 182 B.R. 211, 222 (Bankr. N.D. Ill. 1995); *see In re Toledo*, 170 F.3d 1340, 1345 (11th Cir. 1999).

D. The Section 959 Exception

Finally, Carter asserts that he should be permitted to file his lawsuit in the district court without first obtaining leave from the bankruptcy court pursuant to section 959's statutory exception to the *Barton* doctrine. Section 959 provides for a limited exception to the *Barton* doctrine, permitting suits against "[t]rustees, receivers or managers of any property . . . without leave of the court appointing them, with respect to any of their acts or transactions in carrying on the business connected with such property." 28 U.S.C. § 959(a). However, we note that the "carrying on business" exception in section 959 is limited and not applicable here.

The "carrying on business" exception in section 959(a) is intended to "permit actions redressing torts committed in furtherance of the debtor's business, such as the common situation of a negligence claim in a slip and fall case where a bankruptcy trustee, for example, conducted a retail store." *Lehal Realty Assocs.*, 101 F.3d at 276. Section 959(a) does not apply to suits against trustees for administering or liquidating the bankruptcy estate. *See id.* ("[Section] 959 does not apply where, as here, a trustee . . . perform[s] administrative tasks necessarily incident to the consolidation, preservation, and liquidation of assets in the debtor's estate."); *DeLorean Motor Co.*,

991 F.2d at 1241 ("Merely collecting, taking steps to preserve, and/or holding assets, as well as other aspects of administering and liquidating the estate, do not constitute 'carrying on business' as that term has been judicially interpreted.") (citations omitted).

Carter's action against the Defendants was for breach of fiduciary duty and involves the Defendants' duties as they relate to the administration and liquidation of his estate. Because the alleged breaches attributed to Defendants are not premised on an act or transaction of a fiduciary in carrying out Carter's business operations, section 959(a) is not applicable. Therefore, Carter must obtain leave of the bankruptcy court in order to sue Defendants in a forum other than the appointing court. *See Kashani*, 190 B.R. at 884 ("[B]reach of a fiduciary duty in the administration of the estate does not fall within the exception provided by 28 U.S.C. § 959(a)."); *Mangren v. Bartlett (In re Balboa Improvements Ltd.)*, 99 B.R. 966, 970 (9th Cir. BAP 1989) ("[S]ection [989] was not intended to apply to a breach of fiduciary duty in the administration of a bankruptcy estate.").

III. CONCLUSION

Plaintiff Carter failed to obtain leave from the bankruptcy court when such leave was a pre-requisite to filing this civil action against the Defendants outside of that court. Therefore, the district court lacked subject matter jurisdiction and properly dismissed this civil action against these Defendants.

AFFIRMED.